KOH SIEW KENG & ANOR A

v.

KOH HENG JIN

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
LOW HOP BING JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-04-81-2005]
17 JANUARY 2008 C

CIVIL PROCEDURE: *Jurisdiction - Sessions court - Action by appellant to recover monies in joint account - Whether respondent a constructive or implied trustee - Whether sessions court had jurisdiction to try action - Subordinate Courts Act 1948, s. 69(e)* D

BANKING: *Banker and customer - Joint account - Action by appellant to recover monies in joint account - Whether monies held by account holders as joint tenants or as tenants in common - Material evidence - Agreement between parties - Unqualified admission - Conduct of respondent* E

SUCCESSION: *Executors - Accounts - Action by appellant to recover monies in joint account - Whether respondent accountable to appellant in equity - Whether respondent fell within broader definition of "trustee" given by Trustee Act 1949 - Limitation - Limitation Act 1953, s. 22(1)(a), (b)* F

TRUSTS: *Trustees - Breach of trust - Action by appellant to recover monies held in joint account - Equity - Whether respondent neither a constructive trustee nor a trustee under a resulting trust - Whether respondent fell within broader definition of "trustee" given by Trustee Act 1949* G

LIMITATION: *Administration action - Beneficiary's action for breach of trust - Recovery of monies held in joint account - Equity - Whether respondent fell within broader definition of "trustee" given by Trustee Act 1949 - Whether action barred by limitation - Limitation Act 1953, s. 22(1)(a), (b)* H

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Findings of fact - Failure to evaluate evidence properly - Misdirection of law - Jurisdiction to intervene* I

A ***WORDS & PHRASES:*** *"enforce trusts" - Subordinate Courts Act 1948, s. 69(e) - Actions referred to*

WORDS & PHRASES: *"trustee" - Trustee Act 1969 - Broader definition given by said Act*

B ***WORDS & PHRASES:*** *"fraud" - Limitation Act 1953 - Whether limited to fraud at common law - Whether includes equitable fraud*

In September 1970, one Koh Hooi Chew ('testator') opened a joint account ('account') with Bangkok Bank Ltd in Singapore. C The co-holders of the account were his sons Koh Heng Jin ('respondent') and Koh Heng Teik. The testator paid several sums into the account and when he passed away, he left a will in which he named his widow ('appellant') and the respondent as executors. The will made several bequests and left the residue to D the appellant. A few months later, Koh Heng Teik passed away and the respondent thereby became the only surviving holder of the account. He did nothing about the account for ten years but on 22 October 1981, he emptied the account. He withdrew all the money in it – a sum of S$346,505.09 – and kept it for himself. E The appellant brought an action in the sessions court against the respondent to recover 1/3 of the monies that the latter had withdrawn from the account. She based her claim on an agreement entered into between the testator, the respondent and Koh Heng Teik that each shall be entitled to a 1/3 share of the F sum in the account. That share, she contended, formed part of the residue, and, as the residuary beneficiary, she was entitled to it. The respondent answered this claim in three ways. First, relying on s. 69(e) of the Subordinate Courts Act 1948 ('SCA'), he said that the sessions court had no jurisdiction to try the action. In G relation to this jurisdictional context, the appellant asserted that the respondent was a constructive or an implied trustee of the testator's 1/3 share of the monies in the account. Second, he said that there had been an agreement between the three account holders that the survivor was to have the monies in the account. H Third, he said that the action was barred by limitation, a defence which the appellant met with s. 22(1)(b) of the Limitation Act 1953 ('LA'). The sessions court and the High Court found for the respondent, resulting in the present appeal by the appellant.

I

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The words "enforce trusts" in s. 69(e) of the SCA refer to an action by a beneficiary or beneficiaries, as the case may be, to compel trustees to perform the terms of the particular trust or settlement or to direct them to refrain from doing anything that is inconsistent with the terms of the trust. The Malaysian High Courts, like the Chancery Division of the High Court in England, exercises a supervisory power over trusts to ensure that they are properly administered. It may have to do with the sale of trust property or the payment out of income from a capital asset to beneficiaries. But what those words certainly do not refer to is an action by the true owner to recover monies wrongly appropriated by a person whom equity holds equitable. For reasons that will be clarified shortly, the respondent was not a trustee of the monies he took from the account. He was a person who was accountable in equity to the appellant for the monies belonging to the testator. Accordingly, the sessions court had jurisdiction over the subject matter of the appellant's claim. (para 7)

(1a) It was incorrect to describe the respondent as a "constructive trustee". A constructive trustee is one who holds property under a trust constructed by the law. That is to say – unlike an express trust – it is imposed by law upon a person against his or her will. A constructive trustee is to be distinguished from a person who is under a duty imposed by equity to account to the true owner of money or property that he has unlawfully acquired or has dishonestly assisted another to unlawfully acquire. Such a person is neither a fiduciary nor a trustee in the true sense. An important difference between the two is that a constructive trustee holds his title in favour of the beneficiary while a person liable to account in equity asserts a title that is adverse to the true owner. (paras 8 & 9)

(1b) The appellant's contention that the respondent held the monies in question under an implied trust was also not correct. The label "implied trust" encompasses both resulting and constructive trusts. As already stated, the instant

respondent was not a trustee at all. According to the appellant's pleaded case, the respondent unlawfully appropriated a 1/3 share in the account which belonged to the testator's widow as residuary beneficiary. He was, hence, a person who was liable in equity to account for those monies to the appellant. (para 12)

(2) There were three telling pieces of evidence that supported an agreement between the respondent and the testator that each account holder should have 1/3 share in the monies. In the first place, there were documents relating to the opening of the account which provided that the signatures of all three account holders were required for the monies to be withdrawn. Secondly, there was evidence that the probate in respect of the testator's will that had been obtained in this country was presented to the High Court in Singapore for re-sealing. In the Memorandum of Re-sealing, there appeared the following statement with regard to the list of the testator's assets in Singapore: "1/3rd share in the fixed deposit account No. 1241 with Bangkok Bank Ltd in the names of Koh Hooi Cheow, Koh Heng Jin and Koh Hong Teik (1/3 of S$191,000". It was common ground that the foregoing statement was inserted by the respondent's Singapore solicitor. It was, therefore, on an irresistible inference that the respondent had instructed his solicitor that the testator was entitled to 1/3 share of the sum of S$191,000, which of course did not include the accrued interest. This amounted to an unqualified admission by the respondent under ss. 17, 18 and 21 of the Evidence Act 1950. It was a strong piece of evidence in support of the appellant's claim. Last, but not least, was the respondent's conduct after the demise of his father and brother. If it were true that he, as the survivor, was the absolute owner of the monies in the account, why then did he not draw those monies out at once? Why did he wait for more than ten years before claiming the monies to be his? It must have been because he knew that 2/3 of the money did not belong to him. If all these pieces of evidence were taken together, the only reasonable and probable conclusion that may be arrived at was that the testator was entitled to 1/3 share of all the monies in the joint account. (paras 16, 17, 18 & 19)

(3) The LA in s. 2 says that the words "trust" and "trustee" have the same meanings respectively as in the Trustee Act 1949 ('TA'). For the reasons already stated, the respondent was neither a constructive trustee nor a trustee under a resulting trust. He was a person who was accountable to the appellant in equity. This was because he appropriated the testator's 1/3 share of the monies in question knowing that they did not belong to him. As executor, he was a personal representative of his father's estate and, therefore, fell within the broader definition of "trustee" given by the TA. There was no doubt that he converted to his own use monies not belonging to him. Accordingly, s. 22(1)(b) of the LA applied and the plea of limitation must fail. (paras 21 & 22)

(3a) Section 22(1)(a) of the LA applied equally to the facts of this case. The appropriation by the respondent of monies he knew to belong to the testator amounted at the very least to equitable fraud or unconscionable conduct. It is settled law that the word "fraud", wherever it appears in the LA, is not limited to actual fraud at common law but includes equitable fraud. The respondent having committed a fraudulent breach of trust (having regard to the wider definition adverted to earlier), no period of limitation applied. (paras 23 & 24)

(4) It was very clear that the sessions court and the High Court did not adequately direct their minds to the relevant evidence. Nor was there any proper evaluation of the cogent circumstantial evidence that went to establish the appellant's case. In fact, several important points in the case supporting the appellant's claim were overlooked or not sufficiently appreciated. Both courts also misdirected themselves on the applicable law. This court, thus, definitely had ample jurisdiction to intervene. (paras 26 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Pada bulan September 1970, seorang Koh Hooi Chew ('pewasiat') membuka satu akaun bersama ('akaun') di Bangkok Bank Ltd, Singapura. Pemegang-pemegang bersama akaun adalah dua anak lelakinya Koh Heng Jin ('responden') dan Koh Heng Teik. Pewasiat memasukkan beberapa jumlah wang ke dalam akaun dan apabila beliau meninggal dunia beliau meninggalkan wasiat di mana

beliau menamakan balunya ('perayu') dan responden sebagai wasi-wasi. Wasiat juga membuat beberapa bekues dan meninggalkan residue kepada perayu. Beberapa bulan kemudian, Koh Heng Teik meninggal dunia dan berikutnya responden menjadi pemegang akaun tunggal yang masih hidup. Beliau tidak berbuat apa-apa kepada akaun untuk tempoh sepuluh tahun, namun pada 22 Oktober 1981, beliau telah mengosongkan akaun. Beliau mengeluarkan semua wang di dalamnya – sejumlah S$346,505.09 – dan menyimpannya untuk dirinya sendiri. Perayu memulakan tindakan di mahkamah sesyen terhadap responden bagi mendapat kembali 1/3 dari jumlah wang yang dikeluarkan responden dari akaun. Beliau mengasaskan tindakannya itu atas satu perjanjian yang dimasuki di antara pewasiat, responden dan Koh Heng Teik di mana setiap mereka berhak kepada 1/3 bahagian kepada jumlah di dalam akaun. Bahagian tersebut, menurut perayu, menjadi sebahagian dari residue, dan, selaku benefisiari kepada residue, beliau berhak kepadanya. Responden menjawab tuntutan melalui tiga cara. Pertama, dengan bergantung kepada s. 69(e) Akta Mahkamah Rendah 1948 ('SCA'), di mana beliau berkata bahawa mahkamah sesyen tidak berbidangkuasa untuk mendengar tindakan. Dalam konteks bidangkuasa ini, perayu berhujah bahawa responden adalah pemegang amanah konstruktif atau tersirat kepada 1/3 bahagian wang di dalam akaun yang terakru kepada pewasiat. Kedua, beliau berkata bahawa terdapat perjanjian di antara ketiga-tiga pemegang akaun bahawa orang terakhir yang hidup akan mendapat keseluruhan wang di dalam akaun. Ketiga, beliau berkata bahawa tindakan telah dihalang oleh had masa, pembelaan mana dijawab oleh perayu melalui s. 22(1)(b) Akta Had Masa 1953 ('LA'). Mahkamah sesyen dan Mahkamah Tinggi mendapati untuk responden, dan perayu merayu.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Perkataan "enforce trusts" di s. 69(e) SCA merujuk kepada suatu tindakan oleh seorang benefisiari atau, sepertimana halnya, oleh benefisiari-benefisiari, untuk memaksa pemegang amanah melaksanakan terma-terma sesuatu amanah atau penyelesaian atau untuk mengarahkan mereka supaya tidak melakukan sesuatu yang tidak konsisten dengan terma-terma amanah. Mahkamah-mahkamah Tinggi Malaysia, seperti juga Bahagian Chancery Mahkamah Tinggi England, mempunyai kuasa mengawas terhadap amanah-amanah bagi mempastikan

bahawa ianya ditadbirkan dengan teratur. Ia mungkin bersangkutan dengan penjualan harta amanah atau pembayaran keluar pendapatan dari aset kapital kepada benefisiari-benefisiari. Apapun, apa yang perkataan tersebut tidak merujuk adalah kepada suatu tindakan oleh seorang pemilik sebenar untuk mendapat kembali wang yang dilesapkan secara salah oleh seseorang yang dianggap oleh ekuiti sebagai 'equitable'. Atas alasan-alasan yang akan diperjelaskan sejurus nanti, responden bukanlah pemegang amanah bagi wang yang diambil olehnya dari akaun. Beliau adalah seorang yang bertanggungjawab di sisi ekuiti kepada perayu bagi wang yang menjadi kepunyaan pewasiat. Oleh yang demikian, mahkamah sesyen mempunyai bidangkuasa terhadap halperkara tuntutan perayu.

(1a) Adalah tidak betul untuk memperikan responden sebagai seorang "pemegang amanah konstruktif". Seorang pemegang amanah konstruktif adalah seorang yang memegang harta di bawah amanah yang dibentuk oleh undang-undang. Dalam ertikata lain – tidak seperti amanah express – ia dikenakan oleh undang-undang terhadap seorang yang mempunyai tanggungjawab di sisi ekuiti untuk bertanggungan kepada pemilik sebenar terhadap wang atau harta yang diambil oleh beliau secara salah atau yang ambil oleh seorang lain secara salah dengan bantuan beliau. Ia dikenakan oleh undang-undang tanpa kerelaannya. Seorang pemegang amanah konstruktif perlu dibezakan dari seorang yang memikul tanggungjawab yang dikenakan oleh ekuiti untuk bertanggungan kepada pemilik sebenar terhadap wang atau harta yang diambil olehnya secara salah atau yang diambil oleh seorang lain secara salah dengan bantuan tidak jujur beliau. Orang sedemikian bukan seorang fidusiari atau seorang pemegang amanah dalam ertikatanya yang sebenar. Satu perbezaan penting antara keduanya adalah bahawa seorang pemegang amanah konstruktif memegang hakmilik bagi manfaat benefisiari, sementara seorang yang bertanggungjawab untuk bertanggungan di sisi ekuiti memegang hakmilik yang bermudarat kepada pemilik sebenar.

(1b) Hujah perayu bahawa responden memegang wang berkenaan di bawah amanah tersirat juga tidak betul. Label "amanah tersirat" mengandungi kedua-dua amanah terbitan dan amanah konstruktif. Seperti yang dinyatakan, responden di

sini langsung bukan seorang pemegang amanah. Menurut kes perayu yang diplidkan, responden telah secara salah melesapkan 1/3 bahagian dari akaun yang dimiliki oleh balu pewasiat sebagai benefisiari residuari. Beliau, dengan itu, adalah seorang yang bertanggungjawab pada ekuiti untuk bertanggungan terhadap wang tersebut kepada perayu.

(2) Terdapat tiga keterangan kukuh yang menyokong perjanjian di antara responden dan pewasiat bahawa setiap pemegang akaun harus berhak kepada 1/3 bahagian dari wang. Pertama, terdapat dokumen berkaitan pembukaaan akaun tersebut yang menyatakan bahawa, untuk mengeluarkan wang, tandatangan ketiga-tiga pemegang akaun adalah diperlukan. Kedua, terdapat keterangan bahawa probet berhubung wasiat pewasiat yang diperolehi di negara ini telah dikemukakan ke Mahkamah Tinggi di Singapura untuk dimeterai semula. Di dalam Memorandum Pemeteraian Semula, wujud kenyataan berikut berkaitan senarai aset-aset pewasiat di Singapura: "1/3 bahagian di dalam akaun deposit tetap No. 1241 dengan Bangkok Bank Ltd di atas nama-nama Koh Hooi Cheow, Koh Heng Jin dan Koh Hong Teik (1/3 dari S$191,000.00"). Tidak dinafikan bahawa kenyataan ini telah dimasukkan oleh peguamcara responden di Singapura. Oleh itu, wujud inferens tak tersangkal bahawa responden telah mengarahkan peguamcaranya bahawa pewasiat berhak kepada 1/3 bahagian dari jumlah S$191,000, jumlah mana tentunya tidak termasuk faedah yang terakru. Ini adalah satu pengakuan mutlak oleh responden di bawah ss. 17, 18 dan 21 Akta Keterangan 1950. Ia secebis keterangan yang kuat yang menyokong tuntutan perayu. Yang terakhir, tetapi tidak kurang pentingnya, adalah kelakuan responden selepas kematian bapa dan abangnya. Jika betul bahawa beliau, selaku yang akhir hidup, adalah pemilik mutlak wang di dalam akaun, kenapa beliau tidak mengeluarkan wang tersebut dengan serta merta? Apa perlunya beliau menunggu selama sepuluh tahun sebelum menuntut wang tersebut? Sebabnya tentulah kerana beliau mengetahui bahawa 2/3 dari wang tersebut bukan miliknya. Jika kesemua cebisan-cebisan keterangan ini ditimbang secara bersama, satu-satunya rumusan munasabah dan probable yang boleh dibuat adalah bahawa pewasit berhak kepada 1/3 bahagian terhadap kesemua wang yang ada di dalam akaun.

(3) LA di s. 2 menyatakan bahawa perkataan "trust" dan "trustee" masing-masing mempunyai maksud yang serupa seperti di dalam Akta Pemegang Amanah ('TA'). Atas sebab-sebab yang sudah pun dinyatakan, responden bukanlah seorang pemegang amanah konstruktif dan bukan juga seorang pemegang amanah di bawah amanah terbitan. Beliau adalah orang yang bertanggungjawab untuk bertanggungan kepada perayu di sisi ekuiti. Ini kerana beliau telah mengambil 1/3 bahagian wang pewasiat tersebut walaupun mengetahui bahawa beliau bukanlah pemiliknya. Sebagai wasi, beliau adalah wakil diri pusaka bapanya, dan kerana itu, termasuk ke dalam definasi yang lebih luas "trustee" seperti yang diberikan oleh TA. Tidak diragukan lagi bahawa beliau telah mengambil untuk kegunaannya wang yang bukan terhak kepadanya. Oleh yang demikian, s. 22(1)(b) LA terpakai dan hujah had masa seharusnyalah gagal.

(3a) Seksyen 22(1)(a) LA juga terpakai kepada fakta kes di sini. Pengambilan wang oleh responden yang diketahuinya sebagai milik pewasiat, paling tidak pun, adalah satu perbuatan tidak telus atau 'equitable fraud'. Sudah menjadi undang-undang mantap bahawa perkataan "fraud", di mana ianya wujud di dalam LA, tidak terhad kepada fraud sebenar di sisi undang-undang common tetapi termasuk juga 'equitable fraud'. Dengan responden melakukan pecah amanah fraudulent (mengambilkira definasi lebih luas yang dikatakan sebelum ini), maka tiada tempoh had masa terpakai.

(4) Adalah amat jelas bahawa mahkamah sesyen dan Mahkamah Tinggi tidak mengarahkan pertimbangan mereka dengan secukupnya kepada keterangan-keterangan relevan. Selain itu, tidak terdapat penilaian yang sewajarnya terhadap keterangan-keterangan ikut keadaan yang telah membuktikan kes perayu. Malah, beberapa perkara penting di dalam kes yang menyokong tuntutan perayu telah di lepas pandang atau tidak dinilai dengan sewajarnya. Kedua-dua mahkamah juga telah tersalah arah akan diri mereka berhubung undang-undang yang terpakai. Mahkamah ini, dengan itu, mempunyai bidangkuasa yang kukuh untuk campur tangan.

A **Case(s) referred to:**
Bannister v. Bannister [1948] 2 All ER 133 ***(refd)***
Belhaven & Stenton Peerage [1875] 1 App Cas 278 ***(refd)***
Dubai Almunium Ltd v. Salaam [2002] UKHL 48 ***(refd)***
Gan Yook Chin v. Lee Ing Chin & Ors [2005] 2 MLJ 1 ***(refd)***
B *Guth v. Loft Inc 5 A2d 503* ***(refd)***
Hon Kon Kim v. Betsy Lim Gek Kim [2001] 4 SLR 340 ***(refd)***
Karthiyayani v. Lee Leong Sin [1975] 1 MLJ 119 ***(refd)***
Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 ***(refd)***
Paragon Finance plc v. DB Thakerar & Co (a firm) [1999] 1 All ER 400
C ***(refd)***
Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong [1970] AC 1136 ***(refd)***
Sivapiran v. Lim Yoke Kong [1992] 2 MLJ 381 ***(refd)***
The 'Eurymedon' [1942] 73 Lloyd LR 217 ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669 ***(refd)***
D *Wong Siew Choong Sdn Bhd v. Anvest Corp Sdn Bhd [2002] 3 CLJ 409* ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 17, 18, 21
E Limitation Act 1953, ss. 2, 22(1)(a), (b), 29
Subordinate Courts Act 1948, s. 69(e)

For the appellants - Zainur Zakaria (Ong Peck Ha with him); M/s Ong & Ong
For the respondent - Eric Clement (Yogan Pathmanathan with him);
F *M/s Siva, Thurai, Mariany & Co*

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R1-12-573-00]

Reported by Suresh Nathan

G

JUDGMENT

Gopal Sri Ram JCA:

H **[1]** This appeal raises an interesting issue of some importance. It has to do with question whether monies held in a joint account are held by the account holders as joint tenants or as tenants in common. The facts giving rise to this issue may be shortly stated.

I **[2]** As long ago as September 1970, Koh Hooi Cheow (whom I shall refer to as the testator) opened a joint account with Bangkok Bank Limited in Singapore. The co-holders of that account were his sons Koh Heng Jin (the respondent before us)

and Koh Heng Teik. The testator paid several sums into the account in question. Later, in the same month, the testator passed away. He left a will dated 25 March 1970. He named his widow and the respondent in this appeal as executors. The will made several bequests and left the residue to the widow. A few months after the testator's demise, that is to say, on 11 May 1971, Koh Heng Teik passed away. The respondent thereby became the only surviving holder of the account in question. He did nothing about the account for some ten years. Then, on 22 October 1981, he emptied the account. He withdrew all the money in it – a sum of S$346,505.09 – and kept it for himself. The testator's widow brought an action in the sessions court against the respondent to recover 1/3 of the monies that the latter had withdrawn from the joint account in question. She based her claim on an agreement entered into between the testator, the respondent and Koh Heng Teik that each shall be entitled to a 1/3 share of the sum in the joint account. That share, she contended, formed part of the residue, and, as the residuary beneficiary, she was entitled to it. The 1/3 share claimed by her amounts to S$115,501.70.

[3] The respondent answered this claim in three ways. First, he said that the sessions court had no jurisdiction to try the action. Second, he said that there had been an agreement between the three account holders that the survivor was to have the monies in the account. Third, he said that the action was barred by limitation. I will take each of these points in turn.

[4] Before I deal with the substantive merits of the respondent's objection to jurisdiction I should perhaps say a word about the court's approach to such a question. It is an established proposition that whenever a determination has to be made as to a court's jurisdiction, the truth of the matters alleged in the statement of claim or other pleading must be assumed to be true. I need go no further than to quote from Lord Diplock's judgment in *Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136, Lord Diplock said:

> Since lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the court to grant to the plaintiff the relief sought, the jurisdiction summons can succeed only if it is shown that no matter what were the facts that the plaintiff would be able to establish, relating to the subject matter of the dispute, the court would have no power to grant relief of the kind sought against the defendant.

A So, in the present case, in determining whether the sessions court had jurisdiction over the appellant's claim, it must be assumed that all that is set out in the statement of claim accompanying the summons is true. In other words, it must be assumed that there was an agreement as alleged and that the respondent held the B testator's share in trust.

[5] Now, the respondent's objection to jurisdiction rests on s. 69(e) of the Subordinate Courts Act 1948. The section – with special reference to para. (e) – says that a sessions court "shall C have no jurisdiction in actions, suits or proceedings of a civil nature to enforce trusts". The respondent's case is that the widow was seeking to enforce a trust because she claimed that he (the respondent) acted in breach of trust by appropriating her residuary interest, namely, the 1/3 share. The question is whether D the widow was enforcing a trust in seeking to recover monies she says belong to her. I think she was not. A trustee who uses a beneficiary's money has to account to the latter for it. Similarly, a solicitor who appropriates his or her client's money is a fiduciary who must account for it to the client. An action, by the E beneficiary in the first illustration and by the client in the second, does not enforce a trust but is merely aimed to recover monies as had and received by the defaulting defendant. It is restitutionary relief based on unjust enrichment. In the words of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London* F *Borough Council* [1996] AC 669:

> The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay: *Fibrosa Spolka Akcyjna v. Fairbairn* G *Lawson Combe Barbour Ltd.* [1943] AC 32, 63-64, per Lord Wright; *Pavey & Matthews Pty. Ltd. v. Paul* [1987] 162 CLR 221, 227, 255; *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548, 578C; *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] AC 70. In my judgment, your Lordships should now H unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule *Sinclair v. Brougham* [1914] AC 398 on this point.

[6] Equity is uncompromising in the requirement that a fiduciary or indeed any wrongdoer cannot keep the proceeds of his I wrongdoing. As Layton CJ said when delivering the judgment of the Supreme Court of Delaware in *Guth v. Loft Inc* 5 A2d 503, 510:

> The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.

[7] In my judgment, the words "enforce trusts" in s. 69(e) refer to an action by a beneficiary or beneficiaries, as the case may be to compel trustees to perform the terms of the particular trust or settlement or to direct them to refrain from doing anything that it is inconsistent with the terms of a trust. Our High Courts, like the Chancery Division of the High Court in England exercises a supervisory power over trusts to ensure that they are properly administered. It may have to do with the sale of trust property or the payment out of income from a capital asset to beneficiaries. But what those words certainly do not refer to is an action by the true owner to recover monies wrongly appropriated by a person whom equity holds accountable. For reasons that will become clear in a moment, the respondent is not a trustee of the monies he took from the joint account. He is a person who is accountable in equity to the appellant for the monies belonging to the testator. Accordingly, the sessions court had jurisdiction over the subject matter of the appellant's claim.

[8] Before I move to the second issue, there is an observation that must be made. It has to do with the appellant's assertion raised in the jurisdictional context that the respondent is a constructive or an implied trustee of the testator's 1/3 share of the monies in the joint account. In my judgment, it is not correct to describe the respondent as a "constructive trustee". A constructive trustee is one who holds property under a trust constructed by the law. That is to say – unlike an express trust – it is imposed by law upon a person against his or her will. As Lord Browne-Wilkinson said in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*:

> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion.

[9] A constructive trustee is to be distinguished from a person who is under a duty imposed by equity to account to the true owner of money or property that he has unlawfully acquired or has dishonestly assisted another to unlawfully acquire. Such a person is neither a fiduciary nor a trustee in the true sense. An important difference between the two is that a constructive trustee holds his title in favour of the beneficiary while a person liable to account in equity asserts a title that is adverse to the true owner. This important difference between a constructive trust and a duty to account in equity – overlooked by many – was brought out by Lord Millet in two cases. The first is *Paragon Finance plc v. DB Thakerar & Co (a firm)* [1999] 1 All ER 400; the second is *Dubai Almunium Ltd v. Salaam* [2002] UKHL 48.

[10] In *Paragon Finance*, he said this as a Lord Justice of the Court of Appeal:

> Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v. Grogan* [1869] 4 App. Cas. 82 (a case of a secret trust) and *Rochefoucald v. Boustead* [1897] 1 Ch. 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v. Morgan* [1953] Ch. 43 (where the defendant sought to

keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee.' Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd. v. Cradock* [1968] 1 WLR 1555 at p. 1582 per Ungoed-Thomas J.

[11] The illustrations of a constructive trust given by Millet LJ in the foregoing passage are cases where property was acquired lawfully in circumstances in which his or her conscience was bound by the rights of another or others but was later sought to be appropriated by the acquirer for himself through unconscionable conduct, that is to say, equitable fraud. In *McCormick v. Grogan* there was an attempt to use statute (the Statute of Wills in that case) as an instrument of fraud. So too in *Rochefoucald v. Boustead. Bannister v. Bannister* [1948] 2 All ER 133 and *Hon Kon Kim v. Betsy Lim Gek Kim* [2001] 4 SLR 340 are other examples where statute was used as an engine of fraud. These are merely cases that fall under one category or class of constructive trusts. Another is the case of a vendor of property upon whom a constructive trust is imposed in the purchaser's favour after a specifically enforceable contract of sale has been entered into. See, *Wong Siew Choong Sdn Bhd v. Anvest Corp Sdn Bhd* [2002] 3 CLJ 409.

[12] The contention by the appellant that the respondent holds the monies in question under an implied trust is also not correct. The label implied trust encompasses both resulting and constructive trusts. As I have already said, the instant respondent

A is not a trustee at all. According to the appellant's pleaded case, the respondent unlawfully appropriated a 1/3 share in the joint account which belonged to the testator's widow as residuary beneficiary. He is therefore a person who is liable in equity to account for those monies to the appellant.

B

[13] Despite my criticism of the way in which the appellant's case was presented on the trust point, I must say at once in fairness to learned counsel for the appellant that there is at least some authority which appears to suggest that if X is to be held as a C constructive trustee if he or she receives money or property knowing that it does not belong to him or her. See, *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 QB 391, 473-474; *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669.

D

[14] I now turn to the second issue. It is whether the monies in the joint account belonged solely to the respondent or whether the testator, the deceased Koh Heng Teik and the respondent each had a third share each in the monies in question. Now, when money is placed in a joint account in the names of two or E more persons, then, in the absence of a contrary intention, they hold it as joint tenants. (Let me add in parentheses that the expression "tenant" is here not used in the context of the relationship of landlord and tenant.) It is an incident of a joint tenancy that upon the death of one of the joint tenants, his or F her share goes to the survivor. This is known as the *jus accrescendi.* So, in the present case, in the absence of a contrary intention, the monies, upon the death of the testator and Koh Heng Teik, would accrue to the respondent as absolute owner.

G **[15]** On the other hand, if an intention is disclosed that all the depositors are to have equal shares or shares in some other proportion, then the account holders will be deemed to hold the monies as tenants in common. In other words, the *jus accrescendi* is not a feature of a tenancy in common.

H

[16] The issue in the present case is whether the evidentiary material before the court of first instance disclosed an intention on the part of the testator to create a tenancy in common between himself and his two sons. There are, in my judgment, three telling I pieces of evidence that support an agreement between the respondent and the testator that each account holder should have

a 1/3 share in the monies. In the first place, there are the documents relating to the opening of the account which provide that the signatures of all three account holders were required for the monies to be withdrawn. In the second place, there is evidence that the probate in respect of the testator's will that had been obtained in this country was presented to the High Court in Singapore by the respondent for re-sealing. The respondent engaged solicitors in Singapore to have the re-sealing done. In the Memorandum of Re-sealing, there appears the following statement with regard to the list of the testator's assets in Singapore:

> 1/3rd share in the fixed deposit account No. 1241 with Bangkok Bank Ltd in the names of Koh Hooi Cheow, Koh Heng Jin and Koh Heng Teik (1/3 of $191,000.00)

[17] It is common ground that the foregoing statement was inserted by the respondent's Singapore solicitor. It is therefore an irresistible inference that the respondent had instructed his solicitor that the testator was entitled to 1/3 share of sum of S$191,000, which of course did not include the accrued interest. This, in my judgment, amounts to an unqualified admission by the respondent under ss. 17, 18 and 21 of the Evidence Act 1950. It is a strong piece of evidence in support of the appellant's claim.

[18] Last, but not the least is the respondent's conduct after the demise of his father and brother. If it were true that he, as survivor, was the absolute owner of the monies in the account, why then did he not draw those monies out at once? Why did he wait for more than 10 years before claiming the monies to be his? The answer to these questions must be: because he knew that 2/3 of the money did not belong to him.

[19] Now if you take all these pieces of evidence; not as individual strands; but together the only reasonable and probable conclusion that may be arrived at is that the testator was entitled to 1/3 share of all the monies in the joint account. And that, in my judgment, is how evidence of circumstances must be interpreted. As Lord Cairns said in the case of *Belhaven & Stenton Peerage* [1875] 1 App Cas 278 at p 279:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of

A them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

B **[20]** That brings me to the final line of the respondent's defence. To remind, it is whether the appellant's action is barred by limitation. The appellant met this defence with s. 22(1)(b) of the Limitation Act 1953. That section in its entirety reads as follows:

22(1) No period of limitation prescribed by this Act shall apply
C to an action by a beneficiary under a trust, being an action:

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds
D thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[21] The Limitation Act in s. 2 says that the words "trust" and "trustee" "have the same meanings respectively as in the Trustee Act 1949". The latter Act defines "trust" as follows:
E

"trust" does not include the duties of chargee, but with this exception the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental
F to the office of a personal representative and "trustee", where the context admits, includes a personal representative, and "new trustee" includes an additional trustee.

[22] For the reasons already stated, the respondent was not a constructive trustee. Neither was he a trustee under a resulting
G trust. He was a person who is accountable to the appellant in equity. This is because he appropriated the testator's 1/3 share of the monies in question knowing that they did not belong to him. As executor, he was a personal representative of his father's estate. He therefore falls within the broader definition of "trustee"
H given by the Trustee Act 1949. There is no doubt that he converted to his own use monies not belonging to him. Accordingly, s. 22(1)(b) applies and the plea of limitation must fail.

[23] In my judgment s. 22(1)(a) applies equally to the facts of
I this case. The appropriation by the respondent of monies he knew to belong to the testator amounts at the very least to equitable fraud or unconscionable conduct. It is settled law that that the

word "fraud" wherever it appears in the Limitation Act is not limited to actual fraud at common law but includes equitable fraud. In *Sivapiran v. Lim Yoke Kon*g [1992] 2 MLJ 381, Eusoff Chin J said:

> What is the meaning of 'fraud' in s. 29 of the Act? It may be helpful to look at the decisions of the English courts on the meaning of 'fraud', because s. 26 of the Limitation Act 1939 (UK) is in *pari materia* with s. 29 of the Act. The decisions of the English Court of Appeal in *Beaman v. ARTS Ltd* [1949] 1 All ER 465; [1949] 1 KB 550 and *Kitchen v. Royal Air Force Association & Ors* [1958] 3 All ER 241; [1958] 1 WLR 563 evolved two principles. First, fraud under s. 26 of the Limitation Act (UK) does not necessarily mean deceit in the sense in which it is known in common law; and secondly, the type of conduct which amounts to fraud is the type of conduct which was known in the chancery court as equitable fraud.

[24] I accept that in *Sivapiran v. Lim Yoke Kong* the court was concerned with s. 29 of the Limitation Act. But fraud in s. 29 cannot have a different meaning from fraud in s. 22. The respondent having committed a fraudulent breach of trust (having regard to the wider definition earlier adverted to), no period of limitation applies.

[25] I must here add that if it is at any time accepted on what I most respectfully regard as the doubtful authority of Lord Browne-Wilkinson's speech in the *Westdeutsche* case relying on *Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc* that the respondent became a constructive trustee of the money belonging to the testator in the circumstances already recounted, then the appellant is of course entitled to rely on both limbs of s. 22 on the trust ground and thereby to defeat plea of limitation.

[26] A careful reading of the record provided to us makes it amply clear that the sessions court and the High Court did not adequately direct their minds to the relevant evidence. Nor was there any proper evaluation of the cogent circumstantial evidence that went to establish the appellant's case. In fact, several important points in the case that supported the appellant's claim were overlooked or not sufficiently appreciated. Both courts below also misdirected themselves on the applicable law.

[27] Learned counsel for the respondent urged this court not to intervene as the appeal concerns questions of fact in respect of which there have been concurrent findings. It is quite true that this Court does not, as a general rule, interfere with findings of fact based on the credibility of witnesses. And more so where such findings by the court of first instance have been affirmed by the intermediate court of appeal. But where, as here, an appellant is able to demonstrate a failure on the part of the trial court to evaluate the evidence and to direct itself correctly on the law and such omission is overlooked by the High Court, this court has ample jurisdiction to intervene and will do so to correct a miscarriage of justice. See, *The 'Eurymedon'* [1942] 73 Lloyd LR 217; *Karthiyayani v. Lee Leong Sin* [1975] 1 MLJ 119; *Gan Yook Chin (P) v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1.

[28] For the reasons given, the appeal was allowed. The orders of the courts below were set aside and judgment as prayed for by the appellant in the statement of claim was entered. Costs at all levels were awarded to the appellant and the deposit in court was ordered to be refunded.